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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. BRETT H. FOSTER, Defendant and Appellant.	B164216 (Los Angeles County Super. Ct. No. LA041321)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barry A. Taylor, Judge. Reversed with directions.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec, Supervising Deputy Attorney General, and Susan Lee Frierson, Deputy Attorney General, for Plaintiff and Respondent.

Defendant, Brett Hunter Foster, appeals from his residential burglary conviction. (Pen. Code,[1] § 459.) The jury also found that defendant had previously been convicted of three serious felonies. (§§ 667, subds. (a)(1), (b)–(i), 1170.12.) Defendant, who represented himself throughout most of the trial, argues the trial court improperly: denied his substitution of counsel motion solely on timeliness grounds; denied his continuance request; and instructed the jury with CALJIC Nos. 2.03 and 2.62. We agree the trial court could not deny the substitution of counsel motion on timeliness grounds. Hence, we conditionally reverse the judgment to allow the trial court to rule on the merits of defendant's substitution of counsel motion. If the court finds the motion should have been denied on the merits, the judgment is to be reinstated.

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Osband* (1996) 13 Cal.4th 622, 690; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) The evidence demonstrated defendant broke into the apartment of Lincoln Wheeler by entering through a window. Defendant was found inside Mr. Wheeler's apartment by police officers responding to a call from Ashley Gasper, who lived in the adjacent apartment. Mr. Gasper had heard someone walking on the roof and saw defendant in the hallway. Defendant knocked on Mr. Gaspar's door repeatedly. Mr. Gaspar did not answer. Mr. Gaspar later saw that the window of his neighbor's apartment had been tampered with and called police. Brett Thacher and Patricia Malley, the apartment managers, allowed the officers to enter Mr. Wheeler's apartment. When the officers entered the apartment, defendant, who had been standing in the living room, immediately ran to a balcony, climbed onto the ledge and said: "I'll jump. I'm not going back to jail for this." The officers searched defendant. During the search, defendant was found to be in possession of several items belonging to Mr. Wheeler. Additional items belonging to Mr. Wheeler and his wife had been packed into two of their suitcases and left near the front door.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Defendant testified that he had been asleep in his truck. Defendant's truck was parked just outside Mr. Wheeler's apartment building. Defendant stated that he had slept in his truck overnight. Defendant awoke to police officers dragging him out of his truck. The officers led defendant into the building and up to the third floor. Defendant was pushed by an officer to the balcony and told: "You might as well go. You might as well jump. Go ahead. Go ahead. Do it. We know you're a striker." Defendant told the officers that he would "rather die" than go back to prison for a crime he did not commit. After defendant was handcuffed, the officers "ushered" two witnesses past him. Thereafter he was placed in a police car while his truck was searched.

First, defendant argues the trial court incorrectly denied his substitution of counsel motion pursuant to *People v. Marsden* (1970) 2 Cal.3d 118, 123-124, on timeliness grounds. Defendant argues this ruling deprived him of his Sixth and Fourteenth Amendment rights to counsel. On December 3, 2002, trial was set to commence in this case. A jury had been selected and opening arguments were scheduled for the afternoon session. However, defense counsel notified the trial court that defendant wished to make a *Marsden* motion. Thereafter, the trial court inquired, "Do you want to represent yourself? . . ." Defendant responded, "Sir, I'd rather go pro per on my case than have this man represent me." Defendant explained: "Well, we have irreconcilable differences. The man has lied to me on a couple of occasions, made promises to me and broke them. I've asked for transcripts and he does not seem to want to give them to me. He doesn't seem to want to believe anything I have to say at all. He doesn't want to even come down and discuss the case with me or talk about the case with me in any kind of depth." The trial court noted that it was a "rather unusual" time to be making the motion. Defendant explained that he wanted to dismiss counsel the previous day but had been convinced defense counsel would follow through with his promises to deliver transcripts.

The trial court responded: "Well, if I granted your motion and let you represent yourself, I would not give you a continuance. We've got a jury picked and we're ready to go. We'd start it in five minutes. [¶] Do you understand that?" Defendant then inquired whether he would have cocounsel appointed. The trial court indicated defendant

would not get cocounsel if he decided to represent himself. Defendant continued to register complaints regarding defense counsel. Defense counsel then inquired whether defendant was making a *Marsden* motion or a request for pro se status. Upon clarification that defendant was requesting the appointment of a different lawyer, the trial court denied the motion as untimely. The trial court then again inquired whether defendant wanted to represent himself. Defendant answered, "Well, I'll represent myself before I let this man represent me." Defense counsel suggested the trial court admonish defendant that he would have no special favors and that he would be treated as if he were a lawyer. Defense counsel also noted: "I told [defendant] that the case against him is, in my view, the most overwhelming evidentiary case against the defendant I've ever represented in 12 years because he was caught in the act, and the fact that he dug a hole in the person's wall to try to get through the other side, and there is [*sic*] photographs of that. [¶] . . . [¶] So I'm trying to convey to him and to the court that I don't have any room here to work and all I can do is sit here and make sure the People do their job. . . ." The trial court gave defendant the waiver of counsel form to review and complete. The trial court advised defendant that once that form was completed, if he still wanted to represent himself, "I'll let you do it."

The sole ground upon which the substitution of counsel motion was denied was because it was untimely. We agree with defendant that to deny the substitution of counsel motion made after the jury was selected and prior to opening statements *solely* on timeliness grounds was beyond the allowable scope of judicial discretion. As defendant correctly notes, a substitution of counsel motion can be made prior to the presentation of opening statements. (*People v. Smith* (1993) 6 Cal.4th 684, 693-694 ["the standard expressed in *Marsden* and its progeny applies equally preconviction and postconviction"]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 86-88 [in the midst of a § 1368 competency proceeding]; *People v. Marsden*, *supra*, 2 Cal.3d at pp. 120-124 [after presentation of prosecution case]; see 5 Witkin, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 223, pp. 349-350 ["the trial judge should appoint substitute counsel for a criminal defendant when a proper showing has been made by the defendant *at any stage*

of the proceedings"], original italics.) Therefore, the trial court had no discretion to deny the substitution of counsel motion on timeliness grounds.

Because we have rejected all of defendant's other contentions, it is unnecessary to reverse the judgment and order a retrial at this point. Rather, we can conditionally reverse the judgment and allow the trial court to reach the merits of defendant's substitution of counsel motion. (*People v. Kelley* (1997) 52 Cal.App.4th 568, 580 [conditional reversal and remand for substitution of counsel motion]; *People v. Minor* (1980) 104 Cal.App.3d 194, 199-200 [same]; *People v. Winbush* (1988) 205 Cal.App.3d 987, 992 [same]; see *People v. Hustead* (1999) 74 Cal.App.4th 410, 420 [conditional reversal and remand for resolution of discovery issue]; *People v. Vanbuskirk* (1976) 61 Cal.App.3d 395, 405-407 [same]; § 1260.) Upon issuance of the remittitur, the trial court is to reach the merits of defendant's substitution of counsel motion. If the trial court determines that another attorney should have been appointed, the judgment is to be reversed, new counsel appointed, and the cause set for a retrial. If the prosecution is dissatisfied with an order granting defendant new counsel and ordering a new trial, it may seek writ relief. (See *Ng v. Superior Court* (1997) 52 Cal.App.4th 1010, 1022-1023, disapproved on another point in *Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1069, fn. 6.) If the trial court denies the substitution of counsel motion, it shall reinstate the judgment. Defendant may appeal from the reinstated judgment.

So there is no question, we emphasize the limited circumstances in which an accused is entitled to the appointment of another attorney. Our colleague Associate Justice William F. Rylaarsdam explained: "As noted in *People v. Smith* (1993) 6 Cal.4th 684 [], '[N]ew counsel should not be appointed without a proper showing. . . . The court should deny a request for new counsel at any stage unless it is satisfied that the defendant has made the required showing.' (*Id.* at p. 696.) The showing made here was less than colorably adequate. '"A defendant's right to a court-appointed counsel does not include the right to require the court to appoint more than one counsel, except in a situation where the record clearly shows that the first appointed counsel is not adequately representing the accused. . . ."' (*People v. Marsden, supra,* 2 Cal.3d [at p.] 123, quoting

People v. Mitchell (1960) 185 Cal.App.2d 507, 512 [].) Although the decision whether or not to appoint new counsel rests with the sound discretion of the trial court (*People v. Marsden, supra,* 2 Cal.3d at p. 123), it is an abuse of discretion for the court do so absent a showing the appointed attorney does not or cannot adequately represent the defendant. The record here does not contain anything which approaches such an adequate showing and the order substituting counsel was a clear abuse of discretion. . . ." (*Ng v. Superior Court*, *supra*, 52 Cal.App.4th at pp. 1022-1023.) We leave the issue of whether to grant defendant's substitution of counsel motion in the trial court's good hands.

Second, defendant argues that the trial court improperly failed to grant a continuance to allow him to prepare to represent himself. Defendant read and completed the in propria persona form provided by the trial court. Thereafter, the trial court explained that if found guilty, defendant would be subject to a trial on his prior serious felony convictions. The trial court cautioned defendant against representing himself. The trial court further explained that defendant would be faced with an experienced deputy district attorney. Further, defendant was advised he would be treated as though he were an attorney. Defendant indicated: "I understand what I'm getting into, Sir. I understand that I'm getting into this with no legal representation. . . ." The court again inquired whether defendant wanted to remain represented by defense counsel or proceed on his own. Defendant responded: "I can't get myself in more trouble than 40-years-to-life. That's what [defense counsel] is offering me to try the case. He already told me as much. If I have him as an attorney, he almost guarantees I'll get found guilty and receive 40-years-to-life with him as my attorney. So what other choice have I got?" The trial court reminded defendant that it was his choice. Finally, the trial court advised defendant: "Okay. Last chance. Do you want to represent yourself? I will grant you pro per privileges and the jury will be brought in and we'll start it." Defendant responded, "Let's go, Your Honor." The trial court appointed defense counsel as standby counsel.

A defendant has a federal constitutional self-representation right. (*Faretta v. California* (1975) 422 U.S. 806, 819-820; *People v. Marshall* (1996) 13 Cal.4th 799, 827; *People v. Clark* (1992) 3 Cal.4th 41, 98-99; *People v. Burton* (1989) 48 Cal.3d 843, 852.)

In *People v. Marshall, supra,* 13 Cal.4th at page 827, the California Supreme Court reiterated: "As we have repeatedly held, although a defendant has a federal constitutional right to represent himself [citation], in order to invoke the right he must assert it within a reasonable time before the commencement of trial. [Citations.]" (*Ibid.; People v. Clark, supra,* 3 Cal.4th at pp. 98-99; *People v. Burton, supra,* 48 Cal.3d at p. 852; *People v. Windham* (1977) 19 Cal.3d 121, 127-129.) In *People v. Rudd* (1998) 63 Cal.App.4th 620, 625-626, quoting *People v. Windham, supra,* 19 Cal.3d. at page 128, we explained: "[U]nder California's interpretation of *Faretta*, the trial court must exercise its sound discretion in granting or denying the motion based upon such factors as 'the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay that might reasonably be expected to follow the granting of such a motion.' When California Supreme Court authority has been applied, motions for self-representation made on the day preceding or on the trial date have been considered untimely. (*People v. Burton, supra,* 48 Cal.3d at p. 852; *People v. Moore* (1988) 47 Cal.3d 63, 79-81[]; *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1689 [].)"

Here, as was the case in *People v. Clark, supra,* 3 Cal.4th at pages 110-111, defendant's grant of his self-representation motion was conditioned on his express waiver of any necessary continuance or assistance of advisory counsel. Defendant did not indicate the necessity for a continuance at the time he was granted pro per status. Rather, when told he would have to commence trial immediately, he indicated he was ready, "Let's go, Your Honor." Given the lateness of defendant's request, the trial court could have exercised its discretion to deny the self-representation motion as untimely. (*People v. Burton, supra,* 48 Cal.3d at pp. 852-853; *People v. Moore, supra,* 47 Cal.3d at pp. 79-81; *People v. Douglas, supra,* 36 Cal.App.4th 1681, 1688-1689; see *Moore v. Calderon* (9th Cir. 1997) 108 F.3d 261, 264-265.)

Defendant never requested further delay of the trial nor objected to the court's observation that no continuance could be granted. Hence, this entire issue has been waived and is procedurally defaulted. The California Supreme Court has repeatedly held

that constitutional objections must be interposed in order for those matters to be preserved for appellate review. (*People v. Williams* (1997) 16 Cal.4th 153, 250 [objection raised for the first time on appeal that admission of gang paraphernalia violated defendant's associational rights under the First and Fourteenth Amendments is waived when not presented in trial court]; *People v. Padilla* (1995) 11 Cal.4th 891, 971, overruled on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1 [failure to request a particular instruction where there is no sua sponte duty to instruct is waived due process contention]; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1116, fn. 20 [the defendant's federal constitutional due process, fair trial, reliable guilt determination claims concerning the admissibility of a videotape is waived in a capital case when they were not interposed in the trial court]; *People v. Garceau* (1993) 6 Cal.4th 140, 173 [Sixth and Fourteenth Amendment claims to a fair trial and equal protection in connection with jury selection is waived when not presented in trial court]; *People v. McPeters* (1992) 2 Cal.4th 1148, 1174 [Sixth Amendment discriminatory juror selection issue is waived when not presented in trial court]; *People v. Ashmus* (1991) 54 Cal.3d 932, 972-973, fn. 10 [Sixth, Eighth, and Fourteenth Amendment confrontation, cruel and unusual punishment, and due process claims are respectively waived by failure to interpose them in trial court]; *People v. Rudd*, *supra*, 63 Cal.App.4th at pp. 628-630 [defendant's failure to object to revocation of pro se status waives all constitutional issues.])

The reason for these rules has been articulated by the California Supreme Court as follows: "'"An appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been, but was not, presented to the lower court by some appropriate method . . . . The circumstances may involve such intentional acts or acquiescence as to be appropriately classified under the headings of estoppel or waiver . . . . Often, however, the explanation is simply that it is *unfair to the trial judge and to the adverse party* to take advantage of an error on appeal when it could easily have been corrected at the trial."' (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1,

[] italics in *Doers*.) '"The purpose of the general doctrine of waiver is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had . . . ."' (*People v. Walker* (1991) 54 Cal.3d 1013, 1023 [].) '"No procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." [Citation.]' (*United States v. Olano* (1993) [507] U.S. [725, 731] [].)" (*People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. omitted.) All of defendant's continuance contentions have been waived.

Third, defendant argues the trial court improperly instructed the jury with CALJIC Nos. 2.03 and 2.62. Defendant further argues the instructions violated his constitutional rights of due process and a fair trial. CALJIC No. 2.03 was given as follows: "If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crime for which he is now being tried, you may consider that statement as a circumstance tending to prove consciousness of guilt; however, that conduct is not sufficient by itself to prove guilt and its weight and significance, if any, are for you to decide." CALJIC No. 2.62 was also given as follows: "In this case, the defendant has testified to certain matters. If you find that the defendant failed to explain or deny any evidence against him introduced by the prosecution which he can reasonably be expected to deny or explain because of facts within his knowledge, you may take that failure into consideration as tending to indicate the truth of this evidence and as indicating that among the inferences that may reasonably be drawn therefrom or those unfavorable to the defendant are more probable. [¶] The failure of a defendant to deny or explain evidence against him does not by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt. [¶] If a defendant does not have the knowledge that he will need to deny or explain evidence against him, it would be unreasonable to draw any inference unfavorable to him because of his failure to deny or explain the evidence."

The trial court, the prosecutor, and defendant, who was acting in propria persona, reviewed the proposed instructions. The trial court indicated: "If there is anything that either side wants to add, let me know. If there is anything that I am giving that either side objects to, this is the time to state it, or I'll give you until tomorrow morning to do that, if you'd like to look over the material." Defendant voiced no objections to the proposed instructions. The following morning, the trial court again solicited further discussion regarding the proposed instructions. At that time defendant did object to the withdrawal of CALJIC No. 14.59. However, he did not object to the instructions in question. Defendant's failure to object to the instructions precludes review on appeal. (*People v. Toro* (1989) 47 Cal.3d. 966, 977-978, overruled on another point in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3; *People v. Franco* (1994) 24 Cal.App.4th 1528, 1539; *People v. Hill* (1993) 12 Cal.App.4th 798, 803-804.)

Nonetheless, any error in giving CALJIC No. 2.03 was harmless under any prejudice based standard of reversible error. (*Chapman v. California* (1967) 386 U.S. 18; 24; *People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Williams* (2000) 79 Cal.App.4th 1157, 1171.) As the prosecutor argued, defendant was caught "red handed" inside an apartment that had been burglarized. Defendant had no authority to be there and his version of the events was unbelievable. Moreover, the jury was instructed to disregard any instruction that did not apply to the facts. (CALJIC No. 17.31.) In addition, CALJIC No. 2.03 itself cautions that such "conduct is not sufficient by itself to prove guilt, and its weight and significance, *if any*, are for you to decide" it does not require or suggest defendant made false statements prior to trial. (Italics added.) No prejudice sufficient to permit reversal resulted when CALJIC No. 2.03 was read to the jury. (*Chapman v. California, supra,* 386 U.S. at pp. 21-22; *People v. Ervin* (2000) 22 Cal.4th 48, 91; *People v. Watson, supra,* 46 Cal.2d at p. 836; *People v. Williams* (1995) 33 Cal.App.4th 467, 479.)

CALJIC No. 2.62 was properly given. The evidence presented by the prosecution indicated defendant was found inside the Wheelers' apartment when the officers opened the door with the manager's key. But defendant testified differently. According to the

defendant, the officers physically removed him from his truck and took him inside the apartment. A trier of fact could logically conclude defendant therefore failed to reasonably "explain or deny" the evidence against him. The jury could take that into consideration as tending to indicate the truth of the prosecution evidence. (*People v. Redmond* (1981) 29 Cal.3d 904, 911 ["It is entirely proper for a jury, during its deliberations, to consider logical gaps in the defense case, and the jury is reminded of this fact by [CALJIC No. 2.62]"].) The instruction applies only if the jury finds that defendant failed to explain or deny evidence. (*People v. Lamer* (2003) 110 Cal.App.4th 1463, 1472; *People v. Ballard* (1991) 1 Cal.App.4th 752, 756-757.) Moreover, CALJIC No. 2.62 further cautioned, "[T]he failure of a defendant to deny or explain evidence against him does not by itself warrant in inference of guilt . . . ." In addition, even if the instruction was improperly given, the jury was cautioned by CALJIC No. 17.31 to disregard any instruction that did not apply. Even if it was an error, it was harmless as there was no reasonable probability that a more favorable verdict would have resulted absent the error. (*People v. Ervin, supra,* 22 Cal.4th at p. 91; *People v. Saddler* (1979) 24 Cal.3d 671, 683-684; *People v. Watson, supra,* 46 Cal.2d at p. 836; *People v. Lamer, supra,* 110 Cal.App.4th at pp. 1471-1473; *People v. Plaza* (1995) 41 Cal.App.4th 377, 386; *People v. Ballard, supra,* 1 Cal.App.4th at pp. 756-757.)

The judgment is reversed. The trial court is to reach the merits of defendant's substitution of counsel motion and proceed as specified in the body of this opinion.

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TURNER, P.J.

We concur:

ARMSTRONG, J. MOSK, J.